POSH Semco Pte Ltd v The demise charterers and/or other persons interested in the ship or vessel 'POSH BALI' (IMO No 9180736) of Port of Monrovia, Liberia

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO 27NCC-67–10 OF 2015
AZIZAH NAWAWI J
4 OCTOBER 2016

Civil Procedure — Summary judgment — Admiralty in rem action — Plaintiff vide charterparties subchartered vessel to defendant — Defendant failed to redeliver vessel upon expiry of charterparties — Plaintiff filed application under O 14 r 1 of the Rules of Court 2012 for possession of vessel — Whether defendant owner of vessel — Whether defendant raised triable issue — Whether plaintiff entitled for possession of vessel — Whether plaintiff entitled to summary judgment — Rules of Court 2012 O 14 r 1

Shipping and Navigation — Action in rem — Summary judgment — Plaintiff vide charterparties subchartered vessel to defendant — Defendant failed to redeliver vessel upon expiry of charterparties — Plaintiff filed application under O 14 r 1 of the Rules of Court 2012 for possession of vessel — Whether defendant owner of vessel — Whether defendant raised triable issue — Whether plaintiff entitled for possession of vessel — Whether plaintiff entitled to summary judgment — Rules of Court 2012 O 14 r 1

Swallow Pte Ltd, the owner of a vessel known as 'Posh Bali' ('the vessel') had chartered the vessel to the plaintiff. The plaintiff in turn, vides the first, second and third charterparties ('the charterparties') had subchartered the vessel to Karisma Maritime Sdn Bhd ('the defendant'). Upon the expiry of the charterparties, the defendant failed to redeliver the vessel to the plaintiff as the disponent owner of the vessel, consequently, the plaintiff terminated the third charterparty and brought the present action for summary judgment under O 14 r 1 of the Rules of Court 2012 for their rights of possessions towards the vessel. In its defence, the defendant contended that it had entered into an agreement with Swallow Pte Ltd ('the agreement') and had purchased the vessel for the sale consideration of USD5,336,911.76 and therefore the defendant was the true owner of the vessel and as such no duty was imposed on the defendant to redeliver the vessel to the plaintiff.

Held, allowing the plaintiff's application with costs:

(1) The plaintiff's claim against the defendant was purely contractual and was based on the charterparties. In light of cl 29 of the third charterparty and the termination of the third charterparty on 29 April 2015, the plaintiff as the disponent owner of the vessel became entitled to resume possession of the vessel and was therefore entitled to summary judgment (see paras 21 & 24).

(2) The defendant had not shown that they had obtained title to the vessel under the agreement. In view of the fact that no bill of sale had been shown and that the registration of the vessel remained in the name of Swallow Pte Ltd, the defendant had failed to raise triable issue with regards to their ownership to the vessel (see para 25 & 28).

[Bahasa Malaysia summary

Swallow Pte Ltd, pemilik kapal yang dikenali sebagai 'Posh Bali' ('kapal tersebut') telah mencarter kapal tersebut kepada plaintif. Plaintif sebaliknya, melalui carterparti pertama, kedua dan ketiga ('carterparti') telah subcarter kapal tersebut kepada Karisma Maritime Sdn Bhd ('defendan'). Apabila tamat carterparti-carterparti tersebut, defendan gagal untuk menghantar semula kapal tersebut kepada plaintif kerana pemilik disponent kapal tersebut, oleh itu, plaintif menamatkan carterparti ketiga tersebut dan membawa tindakan ini untuk penghakiman ringkas di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 bagi hak mereka terhadap milikan kepada kapal tersebut. Dalam pembelaannya, defendan berhujah bahawa ia telah memasuki perjanjian dengan Swallow Pte Ltd ('perjanjian tersebut') dan telah membeli kapal tersebut bagi balasan sebanyak ASD5,336,911.76 dan oleh itu defendan adalah pemilik sebenar kapal tersebut dan dengan itu tiada kewajipan dikenakan ke atas defendan untuk menghantar semula kapal tersebut kepada plaintif.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Tuntutan plaintif terhadap defendan adalah semata-mata kontraktual dan berdasarkan atas carterparti. Berdasarkan klausa 29 carterparti ketiga dan penamatan carterparti ketiga pada 29 April 2015, plaintif sebagai pemilik disponent kapal tersebut berhak untuk menyambung semula milikan kapal tersebut dan oleh itu berhak kepada penghakiman ringkas (lihat perenggan 21 & 24).

(2) Defendan tidak menunjukkan bahawa mereka telah memperolehi hak milik kepada kapal tersebut di bawah perjanjian tersebut. Memandangkan fakta bahawa tiada bil jualan telah ditunjukkan dan bahawa pendaftaran kapal tersebut kekal atas nama Swallow Pte Ltd, defendan telah gagal untuk membangkitkan isu yang boleh dibicarakan

A berkaitan kepada milikan mereka terhadap kapal tersebut (lihat perenggan 25 & 28).]

Notes

For a case on admiralty in rem action, see 2(5) *Mallal's Digest* (5th Ed, 2015) B para 9102.

For a case on summary judgment, see 11(2) *Mallal's Digest* (5th Ed, 2015) para 1224.

Cases referred to

C *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)

Emmanuel E Okwuosa & Ors v Owners of the ship and other persons interested in the ship MV Brihope (Hong Leong Leasing Sdn Bhd, Interveners) [1995] 1 MLJ 676; [1995] 2 CLJ 250, HC (refd)

D *Kawasaki Kisen Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433; [2002] 7 CLJ 478, HC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (folld)

The 'August 8th'; The 'August 8th' Owners v Costas Bachas [1983] 1 MLJ 281, E PC (refd)

Legislation referred to

Rules of Court 2012 O 14 rr 1, 2

F *Oon Thian Seng (TS Oon & Partners) for the plaintiff.*
Stanley Augustin (Stanley Augustin & Co) for the defendant.

Azizah Nawawi J:

G INTRODUCTION

[1] In this action in rem against the defendant, the plaintiff is seeking the following reliefs:

H (a) a declaration that the possession of the vessel known as 'POSH BALI' (IMO No 9180736) ('the vessel') of the Port of Monrovia, Liberia be decreed forthwith to the plaintiff who are the disponent owners of the said vessel under the BIMCO Standard Bareboat Charter 'BARECON 2001' form dated 16 February 2015 entered between the plaintiff as disponent owners and Karisma Maritime Sdn Bhd as bareboat I charterers;

(b) damages and expenses arising from the conversion and/or wrongful detention and/or wrongful deprivation or loss of use and/or unlawful

possession of the said ship by the defendant and/or other persons allegedly interested or allegedly having a claim or failed to deliver immediate possession to the plaintiff of the said vessel since 29 April 2015, the date of termination of the bareboat charterparty; and

(c) indemnity in respect of any claims, liens, liabilities or encumbrances when the vessel was not in the custody, control or lawful possession of the plaintiff.

[2] In encl (43), the plaintiff is seeking summary judgment against the defendant under O 14 r 1 of the Rules of Court 2012 ('the ROC 2012') on the following grounds:

(a) that the defendant has failed to deliver the vessel to the plaintiff upon the expiry of the third charterparty on/about 30 March 2015;

(b) that upon the breach of cl 29 of the third charterparty and/or termination of the third charterparty and/or expiry of the period of charter on/about 30 March 2015, the plaintiff as disponent owner became entitled to resume possession of the vessel; and

(c) that there is no triable issue in the defendant's defence.

[3] After considering the application and hearing the parties, the plaintiff's application for summary judgment was allowed with costs.

THE SALIENT FACTS

[4] The plaintiff is a company incorporated in Singapore and is the disponent owner of the vessel. The plaintiff has its registered address in Singapore and its main business activity is in the chartering of the ships, barges and boats with crew.

[5] The defendant, Karisma Maritime Sdn Bhd is a company incorporated in Malaysia and having its registered address at No 89–1, Jalan 1/91, Taman Shamelin Perkasa, Cheras 56100, Kuala Lumpur, Wilayah Persekutuan. The defendant is in the business of providing marine management and other related services.

[6] Pursuant to a series of charterparty agreements, the plaintiff as the disponent owner of the vessel, has subchartered the vessel to the defendant on a bareboat charter basis ('the charters') from 8 April 2013–30 March 2015. The particulars of the charters are as follows:

A (a) by a BIMCO Standard Bareboat Charter 'BARECON 2001' form dated 28 March 2013, the vessel was chartered for the period of six months from 8 April 2013–7 October 2013 by the plaintiff to the defendant ('the first charterparty');

B (b) the charter period under the first charterparty was extended for six months from 8 October 2013–7 April 2014 pursuant to addendum No 1 which forms part of the first charterparty;

(c) by way of a settlement agreement dated 23 April 2014, the first charterparty was extended from 8 April 2014–24 April 2014;

C (d) upon the expiry of the first charterparty, the vessel was further chartered to the defendant 25 April 2014–30 December 2014 by an undated BIMCO Standard Bareboat Charter 'BARECON 2001' form ('the second charterparty'); and

D (e) upon expiry of the second charterparty, the said vessel was further chartered to the defendant from 31 December 2014–30 March 2015 by BIMCO Standard Bareboat Charter 'BARECON 2001' form dated 16 February 2015 ('the third charterparty').

E **[7]** The first charterparty, second charterparty and third charterparty are collectively referred to as 'the charterparties'.

[8] Upon the expiry of the third charterparty on 30 March 2015, pursuant
F to cl 15 of the terms and conditions of the BIMCO Standard Bareboat Charter 'BARECON 2001' form, the vessel was to be redelivered by the defendant to the plaintiff at Singapore. The defendant shall give the plaintiff not less than thirty running days preliminary notice of expected date, range of ports of redelivery or port or place of redelivery and not less than fourteen running days
G definite notice of expected date and port or place of redelivery.

[9] The defendant failed to redeliver the vessel to the plaintiff upon expiry of the third charterparty on or about 30 March 2015.

H **[10]** The plaintiff claims that the defendant still owe the plaintiff charterhire under the third charterparty (together with interest and other ancillary cost) in the sum of USD272,048.72 as of 4 August 2015 which is being litigated in the High Court of Kuala Lumpur via Civil Suit No 22NCVC-430–08 of 2015.

I **[11]** By way of a letter of demand dated 29 April 2015, the plaintiff terminated the third charterparty with the defendant pursuant to cl 28 of the third charterparty. The said letter states that:

> We hereby give you notice of our withdrawal of the Vessel pursuant to clause 28 of the Charterparty without prejudice to any claim we may have against you under the

Settlement Agreement and Charterparties (which is hereby reserved). Accordingly, the Charterparty dated 16 February 2015 shall terminate with immediate effect.

[12] The plaintiff claims that pursuant to cl 29 of the third charterparty and/or termination of the third charterparty on 29 April 2015 and/or expiry of the period of charter on or about 30 March 2015, the plaintiff as disponent owner became entitled to resume possession of the vessel.

[13] However, the vessel was not redelivered to the plaintiff upon termination and/or expiry of the third charterparty. As at the time of the filing of this application, the defendant has not redelivered the vessel to the plaintiff and wrongfully and/or unlawfully retains possession and custody of the vessel.

[14] The plaintiff has arrested the vessel on or about 7 October 2015 and remains under the custody of the sheriff of the High Court pending the disposal of the court of this action on the plaintiff's rights of possession towards the vessel.

FINDINGS OF THE COURT

[15] In an application for summary judgment, this court is guided by the principles laid down in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, where it was stated by the Federal Court as follows:

> ... We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are: (a) whether the case comes within the order; and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
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> (i) the statement of claim must have been served on the defendant;
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> (ii) the defendant must have entered an appearance;
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[16] In the present case, the plaintiff had satisfied the preliminary requirements as laid down in the *Kayu Raya's* case that is:

(a) the statement of claim have been served on been served on the defendant;

(b) the defendant has entered appearance; and

(c) the affidavit in support is in compliance with O 14 r 2 of the ROC 2012.

Therefore, the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against them.

[17] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 the Supreme Court held that the duty of a judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court will have to identify the issues of fact or law and to determine whether they are triable.

[18] With regards to the issue of the application for summary judgment in an in rem action, in *Emmanuel E Okwuosa & Ors v Owners of the ship and other persons interested in the ship MV Brihope (Hong Leong Leasing Sdn Bhd, Interveners)* [1995] 1 MLJ 676; [1995] 2 CLJ 250, Vincent Ng J applied the decision of the Privy Council in *The 'August 8th'; The 'August 8th' Owners v Costas Bachas* [1983] 1 MLJ 281 (from an appeal from Singapore) and held that:

> Closer home, the currently prevailing law is, as lucidly expressed by Lord Brandon, who delivered the judgment of the Privy Council in the celebrated case of *The 'August 8th'; The 'August 8th' Owners v Costas Bachas* [1983] 1 MLJ 281 (PC). His Lordship had this to say (at p 283):
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> > The sole question with which Their Lordships are concerned in this appeal, as was the Court of Appeal in Singapore in the appeal to it from the order of Choor Singh J, is one of jurisdiction and it is this: by the law of Singapore, is a plaintiff in an admiralty action in rem brought by him in the High Court entitled, after he has served a statement of claim on the owners of the property proceeded against and they have entered an appearance in the action, to avail himself of the provisions of O 14 of the Rules of the Supreme Court 1970, in order to obtain, if he can, a summary judgment against such owners?
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> And further down the page he said:
>
> > It has not been suggested, and could not sensibly be suggested, that the Master's action in the present case, being an Admiralty action in rem in respect of pecuniary claims included in the Admiralty jurisdiction of the High Court, falls within any of the exceptions contained in sub-paragraphs (a) and (b) of para (2), or in para (3) of r 1 of O 14 referred to above.
> >
> > That being so, it appears to Their Lordships to be clear beyond doubt that, on

the true construction of O 14 of the Rules of the Supreme Court, 1970, an Admiralty action in rem such as that brought by the Master in the present case, as well as an Admiralty action in personam, is a kind of action in which a plaintiff is entitled to avail himself of the provisions of O 14, and in which the court, if satisfied with regard to the merits of the case, has power to give him a summary judgment under that Order.

Order 14 r 1(2)(c) of the English RSC clearly excludes application for summary judgment in an Admiralty action in rem *whereas O 14 r 1 of the Singapore Rules of the Supreme Court 1970 which is in pari materia with the Rules of the High Court 1980 has no such provision. Hence, the Privy Council decision in The August 8th that O 14 procedure is applicable in an Admiralty action in rem, was based on the construction of the provision in the Singapore Rules of the Supreme Court 1970* in the spirit of the dictum in *Jacobs v Booth's Distillery Co*. (Emphasis added.)

[19] In their statement of defence, the defendant raised only one issue:

(a) that the defendant purchased the vessel from Swallow Pte Ltd for the sale consideration of USD5,336,911.76 and therefore the defendant is the true owner of the vessel and as such no duty was imposed on the defendant to redeliver the vessel to the plaintiff.

[20] However, the plaintiff's claim against the defendant is based on the charterparty, and it is not in dispute that the defendant as a bareboat charterer has entered into a series of bareboat charterparties with the plaintiff from 8 April 2013–30 March 2015.

[21] By way of a fixture note dated 1 January 2013 entered between Swallow Pte Ltd (as the registered owners of the vessel) and the plaintiff, Swallow Pte Ltd has chartered the vessel to the plaintiff from 1 January 2013. The plaintiff then subchartered the vessel to the defendant under the charterparties. Therefore, the plaintiff's claim against the defendant is purely contractual, and is based on the charterparties.

[22] The defendant as charterer of the vessel has failed to pay charterhire to the plaintiff is therefore in breach of the third charterparty. Upon the failure of the defendant to pay charterhire and consequently breached the third charterparty, the plaintiff has terminated the third charterparty. Upon such termination, the defendant is obliged to redeliver the vessel to the plaintiff.

[23] Due to the defendant's failure to redeliver the vessel to the plaintiff as the disponent owner of the vessel, the plaintiff became entitled to resume possession of the vessel pursuant to cl 29 of the third charterparty, which provides as follows:

In the event of the *termination* of this Charter in accordance with the applicable

provisions of Clause 28, the *Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities*. Pending physical possession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as gratuitous bailee only to the Owners. The Owners shall arrange for an authorized representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. The Vessel shall be deemed repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owner's representative. All arrangement's and expenses relating to the settling of wages, disembarkation and repatriation of the Charterer's Master, officers and crew shall be the sole responsibility of the Charterers. In the event of any hindrance or interference by the Charterers, its agents, courts or local authorities, the Charterers hereby indemnifies and keep the Owners indemnified from all and any costs or expenses incurred by the Owners to secure possession of the Vessel.

[24] Therefore, in light of cl 29 of the third charterparty and the termination of the third charterparty on 29 April 2015, I am of the considered opinion and I agree with that plaintiff as the disponent owner of the vessel, the plaintiff became entitled to resume possession of the vessel and is therefore entitled to summary judgment.

[25] With regards to the pleaded defence that the defendant had purchased the vessel from Swallow Pte Ltd for the sum of USD5,336,911.76 and is therefore the true owner of the vessel, the only supporting document to this assertion is an agreement for the purchase of the vessel in the defendant's affidavit in reply. However, the defendant has not shown that they have obtained title to the vessel under that agreement. Therefore, there is no evidence that the defendant has fully paid for the vessel or that they have obtained a bill of sale of the vessel to transfer the title in respect of the vessel from the registered owner of the vessel, Swallow Pte Ltd to the defendant.

[26] If the title to the vessel had been transferred, under the terms of the vessel purchase agreement, the defendant would have obtained a bill of sale over the vessel, but no bill of sale has been shown. The bill of sale would then be used to permanently register the vessel in the name of the defendant to reflect the new ownership of the vessel.

[27] However, from the latest certificate of ownership and encumbrance issued by the Liberia Maritime Authority, the ownership of the said vessel remains with Swallow Pte Ltd. In *Kawasaki Kisen Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433; [2002] 7 CLJ 478, the High Court held that the ship register is conclusive proof of ownership except for error or fraud. The court added that:

> ... *I would take the view that the ship register is conclusive except for error or fraud*. Two authorities clearly established this point. In the case of the *Tian Sheng No 8* the

Hong Kong Court of Final Appeal had stated as follows:

> Conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship: The fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive and it would take an exceptional case for it to be otherwise.

In the case of the *Kapitan Temkin* at p 257 the court therein inter alia also makes the position clear as follows:

> The certificate of registration, adds Chorley & Giles' *Shipping Law* at p 36, 'fulfils to a certain extent the function of title deed'. In this sense the certificate of registration is similar to a certificate of title issued under the Torrens system of land registration which was replicated from the paradigm of the ship registration system. The title evidenced by the certificate of registration is similarly indefeasible, subject of course to rectification in cases like error or fraud. See *The Bineta* [1966] 2 Lloyd's Report 419.

The onus of proof is therefore on Pan Ocean and the defendant to show that Able Shipping's name on the register appears by error or fraud. Since they have not done this it must be taken that the register is conclusive. Under English law, in the case of a registered ship, once the plaintiff establishes that the defendant is the registered owner of the ship when the writ is issued, the burden of proof shifts to the person contending otherwise. A reference to the book by Chorley and Giles, *Shipping Law (8th Ed)* supports the above proposition wherein at p 35 it had this to say:

> *registration is also important as proof of title. It is not conclusive but furnishes at least prima facie evidence of the registered owner being the true owner, thus resulting in a shifting of the burden of proof.* Whoever without being registered claims ownership must displace that prima facie evidence. (Emphasis added.)

[28] Therefore, in view of the fact that no bill of sale has been shown and that the registration of the vessel remained in the name of Swallow Pte Ltd, the defendant has failed to raise triable issue with regards to their ownership to the vessel.

CONCLUSION

[29] To conclude, I am of the considered opinion that there is no real substantial dispute to be tried as the plaintiff's entitlement to repossess the vessel as a result of the breach of the third charterparty by the defendant is clearly set out in cl 29 of the third charterparty. Parties are bound by the contractual provision and therefore the plaintiff's application is allowed with costs.

Plaintiff's application allowed with costs.

Reported by Dzulqarnain Ab Fatar